INDEX.

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	3
Summary of facts	3
Argument	9
I. The decision below is clearly correct	11
II. There is no conflict of decision	16
III. There is no important question of federal law	16
Conclusion	18

Cases Cited.

Berenyi v. Immigration Service, 385 U. S. at p. 636	8
Futch v. Greer, 353 S. W. 2d 896, certiorari denied by this Court 372 U. S. 913	14
Graver Mfg. Co. v. Linde Co., 336 U. S. 271	8
Hoffman v. Stevens, 177 F. Supp. 898 (M. D. Pa.)	15
Linecke v. Dept. of Highways, 76 Nev. 26, 348 P. 2d 235	14-15
Office of Communication of United Church of Christ v. F. C. C., 359 F. 2d 994 (D. C. Cir. 1966)	15
Piekarski v. Smith, 37 Del. Chancery 594, 147 A. 2d 176	15
Road Review League v. Boyd, 270 F. Supp. 550 (S. D., N. Y. 1967)	15

Scenic Hudson Preservation Conference v. F. P. C., 354 F. 2d 608 (2nd Cir. 1965) 15

Wright v. Rockefeller, 376 U. S. 52 16

Statutes Cited.

T. C. A., Section 54-416 10
U. S. Constitution, Fourteenth Amendment 2, 17
23 U. S. C. 128 17
28 U. S. C. 128 2

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 995.

NASHVILLE I-40 STEERING COMMITTEE, ET AL.,
Petitioners,

vs.

BUFORD ELLINGTON, Governor, STATE OF TENNESSEE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF

For Respondents Ellington and Speight in Opposition.

OPINIONS BELOW.

The findings and conclusions of the District Court are shown in the appendix to the petition, as is the opinion of the Court of Appeals, not yet reported.

JURISDICTION.

The procedural jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED.

Whether the District Court abused its discretion in declining to grant a preliminary injunction restraining respondents from constructing a section of Interstate and Defense Highway I-40 along its planned route through the northern portion of the City of Nashville, Tennessee, upon (1) a claim by petitioners that said routing was racially discriminatory in violation of the Fourteenth Amendment, and (2) the further claim that respondents in 1957 failed to comply with the provision of Section 116 (c) of the Federal Aid Highway Act of 1956 (now codified as 28 U. S. C. 128).

STATEMENT.

The basic facts set forth in the petitioners' summary of proceedings in the courts below are correctly stated. Respondents must emphasize however that the hearing in the District Court was not upon the merits of the case, but only upon petitioners' application for a preliminary injunction pending a trial upon the merits. The hearing was had upon only three days' notice to respondents, two of which were over a week end. Further, the complaint called upon respondents to account for actions and decisions made over ten years ago by persons now dead or no longer readily available as witnesses. It raised questions of fact answerable only by reference to matters contained in a mountain of records accumulated for more than a decade in the archives of the Tennessee Highway Department.

The observations made by the District Court and noted by the Court of Appeals concerning the adverse effect of the highway upon the community in question, and inadequate consideration of that impact, must necessarily be viewed against this background of very short notice afforded to respondents. It is reasonably to be inferred that in a hearing upon the merits respondents can produce much more evidence bearing upon the considerations dictating the route chosen. Respondents did show that in laying out the route in question they followed the recommendations made by the engineering firm of Clarke and Rapuano (Tr. p. 101). No witness from that firm however was called by either side.

Summary of Facts.

The petition correctly describes the subject matter of the suit and its location. It incorrectly however describes the area of north Nashville through which the disputed

highway segment passes as "a Negro ghetto". No provision of Tennessee law or municipal law requires persons of the Negro race to reside in any specified area. While the great majority of residents in the area are of the Negro race, a substantial number of persons of other races also reside there (Tr. pp. 110, 225-226).

Petitioners in the District Court adduced testimony to the effect that the area through which Interstate Highway 40 will pass contains a large majority of the Negro owned and operated businesses in Davidson County, and that most of them are on Jefferson Street; that those on Jefferson Street stand to incur serious damage as the result of the taking of private property for the purpose of said highway, the re-routing of traffic, the widening of Jefferson Street (a project of the City of Nashville), and the separating of said businesses from their customers by the barrier which the interstate highway will create. Further testimony on behalf of petitioners undertook to establish the absence of other commercially zoned property in areas populated by Negroes, and that racial discrimination will operate to bar such businesses from white areas.

Petitioners further undertook to show that in other areas of the City of Nashville the interstate highway plan had been designed to minimize or avoid damage to white owned businesses (Tr. pp. 27-28). The witness who so testified identified himself as a city planner whose residence was in Pennsylvania (Tr. pp. 15-16). Upon cross-examination he stated that his familiarity with the City of Nashville and the routing of the interstate highway within its boundaries had been gleaned from two days spent in the city a couple of weeks prior to the hearing (Tr. pp. 50-51). That visit and his presence at the hearing in the District Court constituted the only times in his life that he had been in Nashville (Tr. p. 50).

Petitioners further endeavored to show that three primarily Negro institutions of higher learning, Fisk University, Meharry Medical College and Tennessee A. & I. State University, all situated in the northern part of the City of Nashville and having substantial capital plants and enrollments would be adversely affected by the proposed routing of Interstate 40. Said route will pass between Tennessee A. & I. University and the other two institutions (Tr. pp. 30-31). It was shown that the campuses of Fisk University and Meharry Medical College stand to be isolated from one another by virtue of an increase in the volume of traffic along Eighteenth Avenue, North, which passes between these two institutions, and that this street will become a major arterial route. The construction and maintenance of city streets is a municipal function, over which respondent State officials have no control. It was testified that the interstate highway in question would tend to isolate a new neighborhood health center planned by Meharry Medical College from the population which it serves, and that many Negro churches stand to be detrimentally affected by the routing in that their properties have been or will be taken, or they will be separated from a part of their membership by it (Tr. pp. 232, 234).

Petitioners introduced into evidence a transportation study of the Nashville metropolitan area and parking studies of the central business district and university center area (an area to the south of downtown Nashville in which are situated Vanderbilt University, Peabody College and Scarritt College) (Plaintiffs' Exhibits 5 and 7). The petition suggests that these studies were part and parcel of the plans evolved by the State Highway Department for the routing of Interstate 40 through Davidson County. An examination of these documents however shows quite clearly that they reflect actions taken long after the proposed routing of Interstate 40 had been completed by the

State Highway Department and accepted by the Federal Bureau of Public Roads. The making of such studies could, therefore, have had no conceivable bearing upon the selection of the route for the highway. The statement of facts in the petition (p. 10) quotes from the opinion of the Court of Appeals, including a statement by that Court "a public park used predominantly by Negroes will be destroyed". This is manifestly an inadvertent error upon the part of the Court of Appeals, for petitioners' own proof in the District Court was that only one-third of said park will be destroyed by the road (Tr. p. 37).

Throughout the petition is a manifest undertaking by petitioners to roll into one ball of wax all undertakings of the State Highway Department and the local government of Nashville and Davidson County having any conceivable relationship to the interstate highway program. This is an error so gross and so calculated to mislead that these respondents feel constrained to demonstrate it to the Court at the very outset. It is clearly shown by the record, and nowhere controverted, that the State Highway Department in designing and routing Interstate 40 followed the recommendations of a competent engineering firm, Clark and Rapuano (Tr. p. 101). This firm was engaged for that purpose by the State following the passage of the Federal Aid Highway Act of 1956, and its recommendations were presented and made public in 1957. It so happened that the same firm had been engaged by the local governments in 1955 for the purpose of evolving a proposed expressway system in Nashville and Davidson County (Tr. pp. 372-409). There was no showing whatsoever that these two distinct undertakings by that firm were necessarily related in any way, and as a matter of law they could not have been.

Possibly because of their previous familiarity with the geography of Davidson County, Clarke and Rapuano

evolved a plan for the interstate system not dissimilar in profile to the expressway routing previously recommended to the local governments.

One of the differences consisted in the layout of the segment of Interstate 40 in dispute in this suit. Under the 1955 expressway plan the western leg thereof would have intersected with the so-called "inner loop" at a point just west of the Nashville downtown area. The southern leg of the "outer loop" would have terminated at its intersection with the western leg of the system at a point some twenty blocks to the west of the downtown area. Under the Interstate 40 plan however the outer loop will continue beyond said intersection and be common with Interstate 40 as it proceeds therefrom in an easterly direction through the area in question, to an intersection with Interstate 265 at a point near Eleventh Avenue and Jefferson Street. In short, the interstate plan will operate to place an adidtional leg on the system and divert northeastward bound traffic from the near downtown area. This is clearly reflected by a reference to the maps in the record. It must be emphasized however that when the petition refers to the Clarke and Rapuano recommendations, it is referring to those made in 1955 by that firm to the local governments, although petitioners would have the Court to infer that reference is had to the recommendations made by that firm to the State, in an altogether separate undertaking in 1957. Respondents and their predecessors in office followed the 1957 recommendations, which they had commissioned the firm to make. Nothing in the record even purports to controvert this point. When the petition states that the Highway Department departed from the engineering recommendations of Clarke and Rapuano, such is true only to the extent that the State did not follow the routing proposed by that firm in 1955 to the local governments in an undertaking to which the State and its officials were utter strangers.

This Court has very recently had the occasion to reaffirm its "two court" rule. That rule is that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". **Graver Mfg Co. v. Linde Co.**, 336 U. S. 271. In the 1967 case of **Berenyi v. Immigration Service** it was recognized that this Court "possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues". 385 U. S. at p. 636.

The case at bar fits wholly within this rule. Both lower courts were able to find no facts to make out petitioners' claim of racial discrimination in the location of Interstate 40. Both found petitioners' proof to go to the wisdom only of the route chosen either could find any purpose to discriminate against Negroes or persons of low socio-economic status.

ARGUMENT.

Respondents would emphasize that the only question entitled to be considered is that of whether the learned District Judge abused the broad discretion vested in him with respect to the granting of temporary injunctions pending a hearing on the merits of a suit for an injunction. The Court of Appeals in an unanimous opinion has held consistent with all of the authorities bearing upon the question that there was no palpable abuse of discretion, whatever view may be taken of the facts. The authorities are too numerous to warrant citation in this brief.

It must be emphasized that petitioners here have sought and continue to seek a thwarting of the lawful processes of government and the clearly expressed will of the people of all of the United States, in unmistakable derogation of the public welfare. Upon the President's recommendation Congress made provision in 1956 for a comprehensive interstate and defense highway system to be completed by the year 1972. It is generally known that that program is now well advanced, though many miles of the roadway remain to be built. What is sought to be enjoined in this case is a very vital link thereof through a very vital area of the State of Tennessee. When it is completed, all that will remain to connect the cities of Memphis and Knoxville, over four hundred miles apart, is a twenty-five mile stretch in the eastern part of the State. Work upon this vital link, scheduled to have commenced in mid-November, has already been delayed for two months, to the possible financial detriment of the State in obtaining a contract therefor, by petitioners' flagrant abuse of the judicial processes. These delays have been trumpeted by petitioners as victories, a fact which is borne out by the newspaper articles upon which petitioners see fit to rely in the absence of legal authority (Petition, pp. 17-18).

Respondents would point out to the Court here that they have communicated to counsel for petitioners their willingness to discuss and consider changes in the design of the highway calculated to improve the access between the areas alleged to have been separated by its routing. This was done following the argument of the cause before the Court of Appeals. No reaction upon the part of petitioners however has been observed, a fact which suggests to respondents that petitioners are more interested in delaying the highway construction than they are in the reduction of its impact upon them.

At the time the instant suit was filed it was a known fact that invitations to bid upon the contract for the construction of the highway segment in question had already been extended and that said bids would be received on October 31, 1967. State law requires that the contract be awarded within ten days from the bid day. Section 54-416, T. C. A. Immediately upon filing this suit to enjoin the construction, petitioners sought a stay order which the District Judge declined to grant in advance of a hearing. When at the conclusion of the hearing he declined to grant the injunction, petitioners moved that a stay order be granted pending an appeal to the Court of Appeals, which motion was not granted. Petitioners then petitioned the Court of Appeals for such a stay order which was granted pending its hearing upon the matter, which hearing was set for December 8, 1967. When the order of the District Court was affirmed, the stay order remained in effect for twenty days under Rule 24. Petitioners waited until the last possible day (as a matter of fact the twenty-first day, the twentieth falling on a Sunday) before filing their petition for certiorari in this Court. As of that time they had succeeded in forestalling the construction of the highway in question for two months merely by the utilization of routine judicial process without any semblance of a finding of substance in their claim. At no time since the inception of this con-

troversy have petitioners offered or recognized any obligation whatsoever to indemnify the public as against any loss on account of these unwarranted delays in the performance of legitimate governmental functions, and there is no indication at the present time that their disposition toward the question is any different. Some $10,000,000 of state and federal funds have presently been spent upon the project in question, and the State has been precluded from executing a very advantageous contract for the construction. It is by no means certain that the contractor will agree to perform it upon the same terms if the State is compelled to delay further its execution thereof. Prices of labor and materials by common knowledge continue to advance, and no contractor can be expected to agree at any time to the same terms he might have found acceptable several months ago.

I.

The Decision Below Is Clearly Correct.

No semblance of federal jurisdiction exists to hear and determine this controversy unless it can be shown that the state action complained of is violative of the Fourteenth Amendment in that it denies to petitioners and those whom they claim to represent the equal protection of the laws. Thus petitioners undertake to make out by their charge that the routing of the interstate in question discriminates against the Negro community of Nashville. There is no evidence whatever in the record that the routing was in furtherance of any purpose to discriminate against anybody. To the contrary, the evidence is that the State Highway Department treated the whole problem as an engineering matter and relied upon the recommendations of a competent engineering firm. Like any highway routing through an urban area, it will cause a certain amount of dislocation to private interests. It has nowhere been even suggested however by any of the proof that anyone having anything to do with the

design or location of the highway undertook to place this burden upon any particular racial group to the exclusion of other such groups.

Petitioners have established only two facts—(1) that some persons will be disadvantaged by the routing of the highway link in question, and (2) that the majority of such persons are Negroes. These facts do not make out racial discrimination. Such would be made out if a purpose to discriminate could be shown either expressly or by necessary inference. No such purpose appears however. What does appear is that State officials were confronted with a necessity of connecting the western leg of Interstate 40 with Interstate 265 at some advantageous point in north Nashville, having due regard for topographical, engineering and distance considerations. In locating said link, they conformed to a straight line more closely than any alternative routing which has been suggested or pointed to by petitioners.

A reference to the map shows that the link in question is but a comparatively small part of an interstate highway complex as projected in the metropolitan area of Nashville. Nashville will constitute the hub of a wheel having six spokes, each of which is an interstate highway. An elaborate network of urban connector routes is essential. They will pass through virtually every sector of the city. These sectors have widely varying racial make-ups. Residences, businesses, public buildings and areas, and churches will be affected to some extent wherever they happen to be in the path of or adjacent to the highway. It is evidently petitioners' feeling however that they should be exempt from the common exposure to the governmental power to locate and construct highways and the necessary exercise of the right of eminent domain.

Petitioners appear to suggest in the introduction to their statement of reasons for the granting of the writ herein

that there exists some judicial obligation to forestall or ameliorate the consequences of the interstate highway program upon persons residing in the slum areas of cities. Implied criticism is levied upon highway designers who route super-highways through city slums, thereby compelling the relocation of "ghetto" families. Such criticism necessarily suggests by implication that the roads should be routed circuitously if they must be, through the more desirable residential and commercial areas, with the attendant huge outlay of public funds which would be necessary to provide just compensation to the owners of these properties. There can be but one answer to such a philosophy. If lay writers of sociological bent are not concerned with the prudent expenditure of public tax dollars, public officials charged with the duty of designing and constructing public highways with those tax dollars must be so concerned. It would certainly make little sense to devote some public funds to slum clearance while at the same time spending other public funds for the purpose of keeping the slums in status quo.

By these statements respondents do not suggest that it would be proper to route highways through the slums when other legitimate conisderations would dictate a different routing. They merely state that the slums are not to be avoided simply because they are slums. No law of which respondents are aware would require them to do so in laying out a highway, or for that matter even permit it. If they undertook to do so we may be fairly certain that the federal highway authority would decline to participate in the project. If slum areas are to be preserved inviolate from intrusion of "great rivers of concrete creeping like lava", respondents suggest that such purpose can be accomplished through legislative action. It is not however a proper function of the courts to guarantee to such communities immunity from the advance of civilization.

The petition, without making reference to any specific instances of such, assumes that State officials in this case "have plainly engaged in racial discrimination". Certainly one who makes such a charge is onerated with the burden of proving it by clear and cogent evidence, and evidence which fairly admits of no other conclusion. Neither of the courts below could find any circumstance reflecting such conclusion, and petitioners have directed the attention of this Court to none.

Petitioners' charge of racial discrimination, if sustained, would raise far more questions than it answers, if they can thwart the construction of a highway upon such a basis and compel it to be re-routed, the effects of which they complain will simply be transferred from them to some other community in urban Nashville. The inhabitants of that community would then be free to come in and bring the same suit that petitioners have instigated here, unless of course petitioners assume that only members of their own ethnic group would enjoy the standing to bring such a suit. If the right to do so be conceded to all equally, then it would have to be concluded that the construction of super-highways through urban areas will be permanently halted.

Petitioners from the outset have with persistence argued that the hearing conducted in May of 1957, pursuant to 23 U. S. C. 128, was not a sufficient compliance with that statute, and that such alleged non-compliance affords grounds to vitiate the entire project. Both the District Court and the Court of Appeals recognized that this federal statute imposed duties enforceable by the Secretary of Transportation or his predecessors having the duty of administering the federal aspects of the interstate highway program. Both Courts cited in support of their conclusion the cases of **Futch v. Greer**, 353 S. W. 2d 896, certiorari denied by this Court 372 U. S. 913; **Linecke**

v. Dept. of Highways, 76 Nev. 26, 348 P. 2d 235; **Piekarski v. Smith**, 37 Del. Chancery 594, 147 A. 2d 176; and **Hoffman v. Stevens**, 177 F. Supp. 898 (M. D. Pa.)

Respondents submit that these authorities are unassailable in logic and reason in their regard of the federal statute in question as establishing standards for the guidance of the federal highway authority in determining the question of federal participation in an interstate highway project. They do not operate to place a sword in the hands of any citizen who may feel himself aggrieved by some real or imagined defect in the procedure followed by state highway departments.

In the instant case the proceedings conducted in Nashville, relative to the entire interstate system in Davidson County, are shown by the record to have satisfied the Federal Highway Administrator, and upon the basis thereof federal participation in the entire Davidson County project was approved (Tr. 390).

If petitioners feel, ten years later, that the proceedings conducted did not meet the conditions laid down by federal law, it would appear that they would have made the federal highway authority a defendant to the suit. The fact is, however, that they did not do so. They prefer for some reason to look upon the statute in question as giving them standing to maintain a suit against state officials independently of the federal authorities. Attention is called to the fact that in those instances where a citizen's standing to rely upon such a federal statute has been upheld, the suits have invariably been brought against a federal agency or officer. **Scenic Hudson Preservation Conference v. F. P. C.**, 354 F. 2d 608 (2nd Cir. 1965); **Office of Communication of United Church of Christ v. F. C. C.**, 359 F. 2d 994 (D. C. Cir. 1966); **Road Review League v. Boyd**, 270 F. Supp. 550 (S. D., N. Y. 1967).

II.

There Is No Conflict of Decision.

Petitioners make no suggestion that the decision of the Sixth Circuit Court of Appeals in the instant cause is in conflict with any other decision upon the same or similar subject matter either by that Court or by any other federal appellate tribunal. To the contrary, their approach to the matter concedes that the precise question which they raise has not been decided any differently by the federal judiciary from the way it was decided by both courts below. There is therefore no warrant for this Court to grant the petition for certiorari for the purpose of resolving a conflict between federal appellate courts.

III.

There Is No Important Question of Federal Law.

No basis urged for federal intervention in the matter of the location of the highway in question is made out in the questions posed by the petition. As hereinbefore noted, the petition charges nothing in the way of state action reflecting a purpose to discriminate against petitioners on account of either their race or their claimed low socio-economic status. All that is shown is that they are mainly Negroes and that some Negroes will suffer economic disadvantage on account of the highway location. Discriminatory effect, absent a discriminatory purpose, has never been shown to afford a basis for the assertion of federal jurisdiction under the Fourteenth Amendment.

A compelling analogy exists between the claim made by petitioners and the one made by appellants in **Wright v. Rockefeller,** 376 U. S. 52. There it was contended that equal protection was violated by a congressional districting plan which resulted in Manhattan's being divided into

four districts having colored populations of 86, 28, 27 and 5 percent, respectively, It was said that this made out a prima facie case of a purpose to discriminate against non-whites. Counsel argued that if the districts were created with race in mind, or if **the results or effect** was to create racially segregated areas, then there was violation of the Fourteenth (and Fifteenth) Amendment. No proof of racial motivation was shown, however. The lower court held there was no violation of equal protection and this Court affirmed, holding that the lower court "was not compelled to find that these districts were the product of a contrivance to discriminate" (p. 57).

Adverse results or effects, standing alone, do not represent denial of equal protection. Intent to discriminate must appear, either positively or by unmistakable inference. The choice of the proposed routing is at minimum just as consistent with an impartial exercise of legitimate judgment as it is with a thesis of discrimination. Such is insufficient justification to overturn the discretion of the trial judge.

Alleged non-compliance with a federal statute directed at the federal government has never been held to afford a basis for federal jurisdiction against those who are not federal officials and in no privity with federal officials. In designing, laying out and proposing interstate highway routings, state officials are not agents of the federal government. They are required to comply with federal standards only as a condition precedent to federal monetary participation in the project. The only consequences which can stem from non-compliance with the statute are non-participation or non-contribution by the federal government. There is nothing in the federal law to prevent a state from constructing the identical project with its own funds if it chose so to do. Here the State's compliance with the federal standard established in 23 U. S. C. 128,

has apparently been wholly satisfactory to the agency charged with the enforcement of such standard, and no question has been raised as against that agency.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

.....,
GEORGE F. McCANLESS,
Attorney General,

.....,
MILTON P. RICE,
Deputy Attorney General,

.....,
THOMAS E. FOX,
Deputy Attorney General,
Attorneys for Respondents
Ellington and Speight.

Certificate.

I, Milton P. Rice, one of the attorneys for respondents in this cause, do hereby certify that I have caused a copy of the foregoing brief in opposition to the petition for certiorari herein filed to be served upon the Honorable Jack Greenberg and Avon N. Williams, Jr. attorneys for petitioners herein, by mailing a copy thereof to them at their last known address, United States postage prepaid.

.....
Milton P. Rice.